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September 14, 2005

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Ms. Marlene H. Dortch  
 Secretary  
 Federal Communications Commission  
 445 12th Street, S.W.  
 Washington, DC 20554

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Federal Communications Commission  
 Office of Secretary

Re: *Applications for Consent to Transfer Control of Filed by Verizon  
 Communications, Inc. and MCI, Inc., WC Docket No. 05-75 –REDACTED*

Dear Ms. Dortch:

A recent ex parte filed by a group of CLECs rehashes their assertions that the combination of Verizon and MCI will harm competition in purported “markets for wholesale access services,”<sup>1</sup> and that Verizon and MCI have not provided sufficient information from which the Commission could conclude that this transaction is in the public interest. As we have previously demonstrated at length, they are wrong on both counts.

As an initial matter, the CLECs’ most recent ex parte does not contain any new evidence or even new arguments, but instead merely repackages claims that they have made previously in earlier filings. Indeed, the specific focus on the specific claims this time around is not even this transaction, but the separate merger of SBC and AT&T. And while they assert that we have “made arguments and claims and have submitted data similar to that filed by SBC and AT&T,”<sup>2</sup> they never directly address any portion of the voluminous showing that this transaction is in the public interest. In any event, we have already extensively refuted their claims as applied to this transaction,<sup>3</sup> and the claims fare no better on this retelling.

As we have shown, MCI is not a unique source of competition for high-capacity special access services. MCI has deployed competing fiber facilities in limited geographic areas in Verizon’s region, which we have demonstrated are the same central business districts and other

<sup>1</sup> Ex Parte Letter from Brad E. Mutschelknaus, Kelley Drye & Warren LLP, to Marlene Dortch, FCC, WC Docket Nos. 05-65 & 05-75, at 3 (filed Aug. 31, 2005) (“Joint CLEC Aug. 31 Ex Parte”).

<sup>2</sup> *Id.* at 1 n.1.

<sup>3</sup> See Ex Parte Letter from Dee May, Verizon, and Curtis Groves, MCI, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-75 (filed Sept. 9, 2005) (“Verizon/MCI Sept. 9, 2005 Ex Parte”); Verizon and MCI, Response to Analysis of the Alliance for Competition in Telecommunications (ACTel) (June 2005), attached to Ex Parte Letter from Dee May, Verizon, and Curtis Groves, MCI, to Marlene Dortch, FCC, WC Docket No. 05-75 (filed June 30, 2005) (“Verizon/MCI June 30, 2005 Ex Parte”); Special Access White Paper, attached to Ex Parte Letter from Dee May, Verizon, and Curtis Groves, MCI, to Marlene Dortch, FCC, WC Docket No. 05-75 (filed Aug. 25, 2005) (“Special Access White Paper”).

areas of concentrated business demand that have been targeted by numerous other competing fiber providers.<sup>4</sup>

Nor is MCI a unique source of facilities-based competition to individual buildings in those limited areas where it has deployed its competing fiber facilities. In Verizon's region, MCI has established fiber connections to only approximately [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] office buildings.<sup>5</sup> Based on the data available to Verizon and MCI, which are necessarily incomplete and likely understate, perhaps significantly, the extent of competitive fiber because they do not include data for all carriers known to operate fiber networks in Verizon's region or complete data for the carriers included, [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] of those buildings (49 percent) are already served by at least one other known provider's fiber.<sup>6</sup> Moreover, the fact that at least two alternative providers were able to deploy fiber to these locations (MCI and one other provider) shows that others could do so as well.

In addition, the overwhelming majority of the remaining buildings are demonstrably suitable for competitive supply as well. Of the [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] remaining buildings, at least [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] are within just a quarter mile of known competitive fiber of a provider other than MCI, and [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] are within a half mile of known competitive fiber.<sup>7</sup> As we have previously demonstrated, other carriers could readily extend their fiber networks to serve these buildings by constructing laterals of this limited length.<sup>8</sup> In addition, at least [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] of these buildings are in locations where the Commission has concluded other providers can deploy fiber, and at least [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] of those buildings generate demand for at least two or more DS3s, which the Commission held is sufficient to demand justify construction of new fiber.<sup>9</sup> Taken together, all this means that at least [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] (or 90 percent) of the MCI fiber-lit end-user buildings without an identifiable additional fiber provider already in the building are within a quarter mile of another provider's fiber or meet one of the Commission's criteria for competitive supply, and at least [BEGIN CONFIDENTIAL] [END

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<sup>4</sup> See, e.g., Verizon/MCI Sept. 9, 2005 Ex Parte at 2-3; Special Access White Paper at 27-33; Joint Opposition of Verizon Communications Inc. and MCI, Inc. to Petitions To Deny and Reply to Comments at 4, 15, 28-37 ("Joint Opposition and Reply").

<sup>5</sup> See Verizon/MCI Sept. 9, 2005 Ex Parte at 4. MCI has also deployed fiber to approximately [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] Verizon central offices and [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] carrier hotels, where there can be no serious claim that MCI is in a unique position. See *id.*

<sup>6</sup> See *id.*

<sup>7</sup> See *id.* at 4-5.

<sup>8</sup> See *id.* at 5-6 & nn.16-18.

<sup>9</sup> See *id.* at 6-7.

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**CONFIDENTIAL]** of these buildings are within a half mile of another provider's fiber or meet one of those criteria.<sup>10</sup>

We have also demonstrated that MCI's resale of special access purchased from Verizon or other incumbents is narrowly limited, and that MCI has no unique ability to resell special access purchased from Verizon because the discounts available to MCI also are available to other carriers.<sup>11</sup>

And not only can other carriers obtain the same discounts as MCI, but the fact that numerous competing carriers have facilities of their own and are collocated in the same wire centers as MCI puts them in the same position as MCI to offer wholesale special access in combination with their own facilities.<sup>12</sup> Indeed, other carriers already are competing more extensively than MCI using special access purchased from Verizon, which belies the claim that MCI has some unique advantage.<sup>13</sup>

In repackaging their previous claims, the CLECs address none of this. The few points they do raise are refuted yet again below.

*First*, although the CLECs claim to be applying the Commission's own methodology from prior merger orders,<sup>14</sup> they in fact are doing nothing of the sort. For example, the Commission has explained that its public interest analysis "employs a balancing process weighing any potential public interest harms of the proposed transaction against any potential public interest benefits," such that the relevant question is whether the "proposed transaction, on balance, serves the public interest."<sup>15</sup> Verizon and MCI have demonstrated that the combination of their complementary networks and capabilities will bring substantial benefits to the end-user customers of high-capacity services.<sup>16</sup> The CLECs simply ignore these benefits in opposing the transaction. The Commission also recognizes that, as part of its public interest analysis, it will "consider technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry."<sup>17</sup> As we have shown, that is plainly the case here: cable companies, other intermodal competitors, and systems integrators are among

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<sup>10</sup> See *id.* at 7.

<sup>11</sup> See *id.* at 18-20.

<sup>12</sup> See *id.* at 20.

<sup>13</sup> See *id.* at 20-21.

<sup>14</sup> See Joint CLEC Aug. 31 Ex Parte at 2.

<sup>15</sup> E.g., Memorandum Opinion and Order, *Application of Nextel Communications, Inc. and Sprint Corp.*, WT Docket No. 05-63, FCC 05-148, ¶ 20 (rel. Aug. 8, 2005) ("*Sprint/Nextel Order*").

<sup>16</sup> See, e.g., Public Interest Statement at 10-18; Bruno/Murphy Decl. ¶¶ 31-52; McMurtrie Decl. ¶¶ 8-20; Bruno *et al.* Reply Decl. ¶¶ 53; Special Access White Paper at 74.

<sup>17</sup> E.g., *Sprint/Nextel Order* ¶ 21.

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the many new entrants that are successfully competing to provide high-capacity services to medium-business and enterprise customers.<sup>18</sup>

*Second*, the CLECs assert that the Commission should define a separate product market for “wholesale access services,” which it should subdivide into numerous geographic markets, either at the MSA-level or at the building-level.<sup>19</sup> But the Commission previously has declined to distinguish between the retail and wholesale provision of the services purchased by large enterprise customers and medium businesses.<sup>20</sup> That is because the Commission has found that, once a carrier has deployed a fiber network, “all of the other capabilities necessary to provide wholesale services are readily attainable.”<sup>21</sup> Because any efficient carrier that deploys a fiber network can use that network to provide service to both end-user customers and other carriers — and, as we have shown, that is precisely what carriers do<sup>22</sup> — there is no basis in the Commission’s precedent or antitrust law for treating “wholesale access services” as a separate product market.

The Commission has also previously found that the relevant geographic market for large enterprise customers and medium businesses is “a single national market.”<sup>23</sup> The CLECs do not address this in arguing for MSA-based or a building-specific market definitions. Instead, they essentially argue that the level of competition must be evaluated on a building-by-building basis, only to argue for a remedy for their claimed problem on a much wider scale. But the fact of the matter is that the only plausible issue relates to the limited areas where MCI has deployed its fiber networks, as those are the only areas possibly affected by this transaction. And, as we have shown, whether this transaction is evaluated on a nationwide basis, with respect to the 30 MSAs in which MCI and Verizon have overlapping fiber facilities, with respect to the 39 groupings of contiguous wire-center areas in those MSAs in which MCI has deployed local fiber, or on a building basis, the result is the same: the combining companies are not among a “small number” of “most significant market participants” for customers generally, or for any relevant subgroup of customers.<sup>24</sup>

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<sup>18</sup> See, e.g., Public Interest Statement at 24-34; Bruno/Murphy Decl. ¶¶ 14-30; McMurtrie Decl. ¶¶ 25-29; Joint Reply Comments of Verizon and MCI at 17-20, 36-37; Bruno *et al.* Reply Decl. ¶¶ 9-13, 16-19, 33-45; Special Access White Paper at 81-83, 85-87.

<sup>19</sup> See Joint CLEC Aug. 31 Ex Parte at 3.

<sup>20</sup> See, e.g., Memorandum Opinion and Order, *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control*, 13 FCC Rcd 18025, ¶ 28 (1998) (“*MCI/WorldCom Order*”) (rejecting claims that it should “analyze wholesale services as a separate and distinct input market” from retail services).

<sup>21</sup> *Id.* ¶ 28.

<sup>22</sup> See, e.g., Public Interest Statement at 31, 56; Joint Opposition and Reply at 65-69; Lew Reply Decl. ¶¶ 7-23; Special Access White Paper at 41, 47-50.

<sup>23</sup> See, e.g., *MCI/WorldCom Order* ¶ 30; Memorandum Opinion and Order, *Application of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent To Transfer Control*, 12 FCC Rcd 19985, ¶ 54 (1997).

<sup>24</sup> Memorandum Opinion and Order, *Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent To Transfer Control*, 15 FCC Rcd 14032, ¶ 98 (2000).

Third, the CLECs (at 3-4) take issue with the fact that Verizon and MCI have not submitted HHI calculations for their proposed wholesale access service markets, or more generally. But these CLECs' claims about the usefulness of HHI calculations in assessing a transaction such as this one are misplaced.<sup>25</sup> Indeed, the leading antitrust treatise explains that "the HHI should always be used tentatively," because "although the HHI appears to give definitive answers to how markets respond to increasing variations in the number and size disparities among firms, such responses are in fact far more complex and depend on" a variety of other factors.<sup>26</sup> That is because the HHI does not capture all aspects of market structure, and market structure is only one of many factors that affect the likelihood of anticompetitive behavior. Not surprisingly, the Department of Justice's ("DOJ") and Federal Trade Commission's ("FTC") Horizontal Merger Guidelines ("DOJ/FTC Guidelines"), suggests only a limited role for HHI calculations, as merely "an aid to the interpretation of market data."<sup>27</sup> More importantly, since the DOJ/FTC Guidelines were issued, HHIs "have, if anything, become progressively less significant."<sup>28</sup>

Even aside from this, there is little reason to believe that HHI calculations would provide any probative information on *this* transaction. That is because the question concerning whether a transaction will injure competition is necessarily predictive and *forward-looking*.<sup>29</sup> Indeed, the DOJ/FTC Guidelines state that the shares used to calculate HHIs should themselves "be calculated using the best indicator of firms' *future* competitive significance."<sup>30</sup> Where, as here, markets are characterized by rapid technological or other changes, or individual firms are either declining or rising rapidly, sound merger analysis requires either that past data not be used for calculations of market structure or that calculations based on such data be used for only limited and tentative purposes.

The use of HHIs is particularly inappropriate in the context of the Joint CLECs' claims relating to the high capacity business, as there is a bid market for such services. As the leading antitrust treatise explains, the use of static market share analysis in this context is misguided because "the firm that won the one contract awarded in a particular year has 100 percent of that year's sales — a most meaningless number when other firms bid and win in other years."<sup>31</sup> This is borne out by the evidence we have presented, which surveys more than 1,200 contracts won by 57 different competing carriers since the beginning of 2003 alone.<sup>32</sup> Although the value of these contracts were available only about a quarter of the time, the total value of such contracts is more

<sup>25</sup> See Verizon/MCI Sept. 9, 2005 Ex Parte at 13-14.

<sup>26</sup> IV P. Areeda *et al.*, *Antitrust Law* ¶ 930b, at 136-37 (rev. ed. 1998).

<sup>27</sup> DOJ/FTC Guidelines § 1.5.

<sup>28</sup> Thomas B. Leary, *The Essential Stability of Merger Policy in the United States* (Jan. 17, 2002) (emphasis added).

<sup>29</sup> See DOJ/FTC Guidelines § 0 ("[T]he picture of competitive conditions that develops from historical evidence may provide an incomplete answer to the forward-looking inquiry of the Guidelines.").

<sup>30</sup> *Id.* § 1.41 (emphasis added).

<sup>31</sup> IIA P. Areeda *et al.*, *Antitrust Law* ¶ 535d, at 225 (2d ed. 2002).

<sup>32</sup> See Special Access White Paper at 87.

than \$66 billion (including at least 153 contracts representing nearly \$1.5 billion for carrier customers).

The specific HHI calculations to which the Joint CLECs point — which are the same calculations we have addressed previously — take none of this into account.<sup>33</sup> In particular, there is no indication that the calculations are based on any “indicator of firms’ future competitive significance,” let alone the “best” such indicator, as the DOJ/FTC Guidelines specify.<sup>34</sup> In addition, the CLECs’ calculations are not focused on the specific buildings that MCI serves using its own fiber — which, as explained above, those are the only locations even arguably affected by this transaction — and instead consider buildings where MCI is not currently a competitor and would have no unique ability to compete in the future. Nor do they take into account the fact that the vast majority of the buildings are either located within a short distance from other providers’ fiber or are in buildings to which the Commission has concluded other providers can deploy fiber.

*Fourth*, the CLECs claim (at 4-6) that the Commission’s determination that carriers can economically serve a building without UNE high-capacity loops — either based on the wire center in which the building is located or the extent of demand for high-capacity services by the tenants — is irrelevant to the question whether this transaction will reduce competition to serve customers in that building. The CLECs base this on the Commission’s rejection, in the *TRO*, of CLECs’ claims that unbundling should be required wherever ILECs retain market power, as measured by a strict application of the Merger Guidelines.<sup>35</sup> But the fact that a market power analysis is irrelevant to determining impairment — because it does not reveal where competition is possible — does not answer the limited question here: will this transaction reduce competition to serve customers in the limited set of end-user buildings in Verizon’s region to which MCI has self-deployed fiber? As to that question, the Commission’s determination that competition is possible to serve those customers is decidedly relevant. The fact that other carriers could deploy fiber to those buildings — and could then sell to customers in those buildings or to other carriers — means that customers in those buildings would still have competitive options after this transaction. Indeed, the fact that a fiber loop can be deployed well within the two-year period considered by the Guidelines demonstrates that the combined entity will not be able to raise prices to customers in those buildings.<sup>36</sup>

*Fifth*, the CLECs complain about the absence of “econometric analyses of the price effects of the proposed merger on the local wholesale market” filed in support of this transaction.<sup>37</sup> Even aside from the fact that there is no “local wholesale market,” the CLECs

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<sup>33</sup> See Verizon/MCI Sept. 9, 2005 Ex Parte at 13-16.

<sup>34</sup> DOJ/FTC Guidelines § 1.41.

<sup>35</sup> See Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶¶ 109-111 (2003), *vacated in part and remanded, USTA v. FCC*, 359 F.3d 554 (D.C. Cir.), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004).

<sup>36</sup> See DOJ/FTC Guidelines § 3.2; Verizon/MCI Sept. 9, 2005 Ex Parte at 5-6 & n.19.

<sup>37</sup> Joint CLEC Aug. 31 Ex Parte at 6.

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simply ignore the substantial record evidence — recounted, in part, above — that there is nothing unique about MCI's ability to use its limited local fiber to compete, either for the business of end-user customers or of other carriers. That evidence demonstrates that this transaction will have no material effects on competition and, therefore, no material effects on the price of high-capacity services, either at retail or wholesale. The Commission has never required a specific type of evidence from merger applicants to show that a transaction is, on balance, in the public interest, let alone specific econometric analyses.

In any event, the so-called “preliminary economic analyses of actual bid submissions” that the CLECs have submitted — the same analyses submitted by Professor Wilkie that we have addressed elsewhere — have no evidentiary value.<sup>38</sup> As an initial matter, the CLECs have failed to provide any of the actual bid data that was supposedly analyzed, and have rejected Verizon's and MCI's request for this data.<sup>39</sup> For this reason alone, the CLECs' economic analysis can be given no weight.<sup>40</sup>

In any event, the limited description that the CLECs and Professor Wilkie have provided makes clear that this analysis cannot be credited. For example, the CLECs continue to refer to MCI's bid in “two auctions last year for transport circuits.”<sup>41</sup> But there is no way from this uninformative description to determine how many circuits were involved in the bids or the locations at which they were demanded. As a result, there is no way to gauge the significance of MCI's ability to supply the bids. Nor is there any way to determine the extent to which MCI's bid relied on its own local fiber network (*i.e.*, using Type I circuits) as opposed to reselling other providers' facilities, including ILEC special access (*i.e.*, using Type II circuits). As we have shown, MCI is not unique in its ability to resell other carriers' facilities. The CLECs also finally admit that the bid analysis is based on “rack” rates, which very few customers actually pay, as they instead purchase special access under discount plans that offer substantial discounts (as much as 40 percent) off of those rack rates.<sup>42</sup>

*Sixth*, the CLECs continue to speculate that SBC/AT&T and Verizon/MCI will collude to refrain from competing with each other following their respective mergers.<sup>43</sup> But the CLECs claims in this regard are a simple repeat of their prior claims, which we have repeatedly refuted

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<sup>38</sup> *Id.*; see Verizon/MCI Sept. 9, 2005 Ex Parte at 6-7.

<sup>39</sup> See Verizon/MCI Sept. 9, 2005 Ex Parte at 21.

<sup>40</sup> As we have noted, the characterization of the results of this analysis are constantly shifting. Compare Joint CLEC Aug. 31 Ex Parte at 7 (asserting that “bid prices [would] increas[e] by anywhere between 11% and 400%”) with Simon J. Wilkie, *Proposed Mergers of SBC/AT&T and VZ/MCI: Preliminary Analysis of Competitive Effects* at 22 (June 14, 2005) (describing the same analyses as demonstrating that “post-mergers, the wholesale price discount from special access rates would decrease on average by over 15%”), attached to Ex Parte Letter from Brad Mutschelknaus, Kelley Drye & Warren LLP, to Marlene Dortch, FCC, WC Docket Nos. 05-65 & 05-75 (filed June 15, 2005).

<sup>41</sup> Joint CLEC Aug. 31 Ex Parte at 6.

<sup>42</sup> See Verizon/MCI Sept. 9, 2005 Ex Parte at 22.

<sup>43</sup> See Joint CLEC Aug. 31 Ex Parte at 7-8.

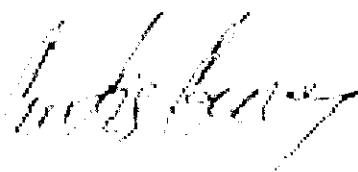
at length.<sup>44</sup> In short, it would not only be economically irrational for the two companies to engage in such collusion — as they would each lose business to carriers that operate in both regions — but also the CLECs' unfounded speculation about supposed collusion is insufficient as a matter of law.<sup>45</sup> In fact, the evidence shows that Verizon and SBC have competed, and continue to compete, extensively with one another.<sup>46</sup>

For the foregoing reasons, as well as those we have set forth in record previously, the Commission should place no weight on the CLECs' claims that we have not demonstrated that this transaction is in the public interest.

Sincerely,



Dee May  
Verizon



Curtis Groves  
MCI

cc: Julie Veach  
William Dever  
Ian Dillner  
Gail Cohen  
Tom Navin  
Don Stockdale  
Gary Remondino

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<sup>44</sup> See, e.g., Verizon/MCI Sept. 9, 2005 Ex Parte at 11-12.

<sup>45</sup> See *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1130 (D.C. Cir. 2001) (in the absence of evidence that "collusion has in fact occurred or is likely to occur," assumption that parties could collude was "mere conjecture").

<sup>46</sup> See, e.g., Verizon/MCI Sept. 9, 2005 Ex Parte at 11-12.

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